(15)

No. 91-471

IN THE

Supreme Court of the United States

October Term, 1991

CHEMICAL WASTE MANAGEMENT, INC.,

Petitioner,

against

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,

Respondents.

Brief of the State of New York as *Amicus Curiae* in Support of Respondents

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(1939—LC6-36—1992)

Question Addressed

In enacting the Superfund Amendments and Reauthorization Act, did Congress authorize states to manage the interstate flow of hazardous wastes, as Alabama has done by enacting the Additional Fee provision, in order to meet the federally-mandated requirement that states demonstrate long term capacity for disposal of such wastes?

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Interest of *Amicus Curiae*

The State of New York submits this brief as *amicus curiae,* pursuant to Rules 37.1 and 37.5 of the Supreme Court rules, in support of the respondents, who urge this Court to affirm the decision of the Supreme Court of Alabama ("court below"), reported at 584 So. 2d 1367 (1991). The court below sustained an Alabama statute which, *inter alia,* imposes an additional

disposal tax ("Additional Fee") on hazardous wastes generated outside Alabama and disposed of at Alabama facilities.[1]

The State of New York has a substantial interest in the outcome of this case. Like Alabama, New York has a large commercial hazardous waste disposal facility within its borders. The New York facility, owned and operated by CWM Chemical Services, Inc. ("CWM"), is the only commercial hazardous waste landfill in the Northeastern United States. In the fall of 1989, it became apparent to New York officials that other Northeastern states intended to meet their capacity assurance obligations under § 104(c)(9) of the Superfund Amendments and Reauthorization Act ("SARA"), 42 USC § 9604(c)(9), simply by continuing to utilize New York's hazardous waste disposal capacity, in lieu of expanding their own capacity as envisioned by SARA.

In response, New York Commissioner of Environmental Conservation Thomas C. Jorling announced his intention to manage the flow of hazardous wastes from other states through cooperative agreements with individual states. Each agreement will, *inter alia*, require the exporting state to impose waste reduction requirements on its generators and transporters equivalent to requirements contained in New York law.[2]

[1]The challenged statutory provision is reprinted at Pet. App. 102a-114a.

[2]New York has one of the most aggressive hazardous waste reduction laws in the nation. *See*, Environmental Conservation Law §§§ 27-0907, 0908 and 0913. These provisions require hazardous waste generators to audit their operations and to implement waste reduction measures which are technically feasible and economically practicable. Stiff penalties are imposed for noncompliance. DEC may reject plans which do not achieve reasonable progress in waste reduction. Ultimately a recalcitrant generator could be forced to curtail operations because it could not issue the certifications or manifests necessary to transport hazardous waste for disposal (Footnote continued on next page.)

New York subsequently attempted to impose these restrictions by issuing a proposed permit modification to the CWM facility. CWM then filed suit in the Western District of New York in December, 1990, asserting, *inter alia*, that New York's proposed modifications violate the Commerce Clause of the United States Constitution. *National Solid Wastes Management Association and CWM Chemical Services, Inc. v. Jorling*, 90-CV-1288A. The Commissioner has defended on the ground that SARA's capacity assurance provisions authorize New York's intention to control the flow of hazardous waste into the State through cooperative agreements with exporting states.

The State of New York respectfully urges this Court to sustain the lower court's decision, and decide that in enacting SARA, Congress authorized states to manage the interstate flow of hazardous waste in order to meet their federally-mandated capacity assurance obligations.

Summary of Argument

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") expressed Congress' displeasure with the failure of many states to site new hazardous waste facilities, and addressed the "Not-in-My-Backyard" problem by requiring *all* states to demonstrate that they will have adequate in-state and/or out-of-state resources for disposing of all wastes

(Footnote continued.)
and on annual reports required by law. This program is consistent with the federal policy codified at 42 USC § 6925(h), and reflects New York's preferred hazardous waste management hierarchy, codified at Environmental Conservation Law §27-0105, which calls for: (1) reduction or elimination of hazardous wastes that continue to be generated; (2) reuse and recycling of hazardous wastes that continue to be generated; (3) use of detoxification, treatment or destruction technology; and (4) phasing out land burial of hazardous wastes except for treated residuals posing no significant threat to public health or the environment.

generated within the state for the next two decades. In enacting SARA, Congress authorized states to manage out-of-state access to waste disposal facilities in order to meet these mandated capacity assurance requirements. Finally, the Additional Fee provision, enacted by Alabama to ensure adequate landfill space for Alabama's waste generators, is consistent with the Congressional authorization contained in SARA.

Argument

Congress enacted the capacity assurance provisions in SARA to force states to site new, state-of-the-art hazardous waste treatment facilities designed to safely handle wastes that continue to be generated by industrial activities and Superfund remedial efforts. In sustaining Alabama's Additional Fee provision, the court below enabled Alabama to protect its valuable disposal capacity from states that are content to continue to export unreasonable quantities of hazardous waste without regard to their own siting obligations. Affirmance by this court is necessary to clarify the ability of states to manage out-of-state hazardous waste imports in order to meet their federally-mandated capacity assurance obligations.[3]

[3]Alabama did not argue in the lower courts that SARA authorizes the Additional Fee provision. Instead, it asserted that the provision furthers legitimate local purposes—protection of public health and the state's natural resources—that cannot be adequately met by reasonable non-discriminatory alternatives. 584 So. 2d at 1388-1390. In light of this Court's time-honored practice of not reaching constitutional issues unnecessarily, *see, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them"), the State of New York respectfully suggests that the Court can sustain the lower court on the nonconstitutional ground that the Additional Fee provision is authorized by Congress' enactment of SARA.

A. In Enacting the Capacity Assurance Provisions of SARA, Congress Authorized States to Manage the Interstate Flow of Hazardous Waste to meet their Assurance Obligations.

In 1980 Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* ("CERCLA") in order to ensure cleanup of inactive hazardous waste sites. CERCLA established liability standards for persons responsible for cleanups and created a "Superfund" for use when responsible parties do not carry out cleanups. *See,* 42 USC § 9601, *et seq.*

Congress reauthorized CERCLA in 1986, enacting the Superfund Amendments and Reauthorization Act ("SARA"), P.L. No. 99-499. Because Congress concluded that few states had developed programs to assure safe disposal capacity for hazardous waste which continued to be generated by industry, it enacted a capacity assurance provision ("CAP"), codified at § 104(c)(9) of SARA, 42 USC § 9604(c)(9). This provision directed each state to demonstrate to the United States Environmental Protection Agency ("EPA") that the state will have adequate capacity available to dispose of or otherwise manage the hazardous wastes generated within the state for the next twenty years.

The legislative history of SARA demonstrates that the intent behind the capacity assurance obligations was to ensure adequate siting of new, state-of-the-art hazardous waste management facilities across the country. *See,* S. Rep. No. 11, 99th Cong, 1st Sess. 22 (1985):

> "Pressures from local citizens place the political system in an extremely vulnerable position. . . .The broader social need for safe hazardous waste management facilities often has not been strongly represented in the . . . process [of creating new facilities]. A com-

> mon result has been . . . no significant increase in hazardous waste capacity over the past several years."

Similarly, Senator Chafee, the sponsor of the CAP provision, stated on October 3, 1986 (the date upon which the legislation passed the Senate) that:

> "The objective of the siting amendment is to *force* states to provide safe and adequate facilities for toxic and hazardous waste."

132 Cong. Rec. S. 14924 (emphasis supplied).

Congress recognized that not every state would be able to create new disposal facilities or otherwise manage its waste within its own borders for the next twenty years. Thus, states have the option of using capacity outside their borders pursuant to agreements with other states. If EPA determines that state capacity certifications are not adequate, the state is *prohibited* from receiving Superfund money for hazardous waste site cleanups taken within the state. 42 USC §9604(c)(9).

The CAP amendments thus contain two important elements: first, they force states to plan for and develop safe disposal or treatment capacity for all hazardous waste generated for a twenty year period; second, to the extent a state uses disposal facilities outside the state, it can only do so pursuant to interstate or regional agreements with the states in which such facilities are located. As such, Congress has authorized states to manage out-of-state access to waste disposal facilities by requiring exporting states to enter into cooperative agreements acceptable to the host state.

While Congressional consent for states to impede commerce must be clear, there is no "talismanic significance" to any particular method of demonstrating Congressional authorization. *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 90 (1984). This Court has identified three ways in which such consent may be established: (1) from Congressional intent, *see, Wunnicke, supra* at 92-93; (2) through an evaluation of federal policy, *Wunnicke* at 88; and (3) based upon a course of conduct, *Wardair Canada, Inc. v. Florida Department of Revenue* , 477 U.S. 1, 10 (1986). Significantly, once Congress has authorized state regulation of interstate Commerce, *any* action taken by a State within the scope of the congressional authorization is rendered invulnerable to a Commerce Clause challenge. *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981).

As demonstrated above, Congress determined that it was in the national interest to ensure development by the states of safe, long-term disposal capacity for hazardous waste which continued to be generated nationwide. In enacting the CAP provisions, Congress intended to *force* states to develop such capacity, and threatened states with the loss of Superfund cleanup monies in the event of failure. The only way for "host" states to avoid this drastic penalty is to control the flow of waste to commercial disposal facilities located within their borders—the Emelle landfill in Alabama's case. Any other construction of SARA would prevent a state from managing and predicting capacity, and would ultimately subject it to the loss of Superfund dollars.[4]

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[4]New York recently sued the Environmental Protection Agency, claiming that the federal agency has failed to carry out its mandatory duty under 42 USC §9604(c)(9) to appropriately sanctioned states that have refused to develop new hazardous waste disposal capacity. *State of New York, et al. v. Reilly*, 91-CV-1418 (N.D.N.Y.). New York alleges that (Footnote continued on next page.)

B. The Additional Fee Provision is Consistent With the Congressional Authorization to the States Contained in SARA.

Finally, the Additional Fee provision, enacted by Alabama to, *inter alia*, satisfy its federally-mandated CAP obligations, is consistent with the authorization conferred by Congress in SARA. The provision discourages disposal at Alabama's Emelle disposal facility and forces states previously dependent upon Emelle to develop facilities within their borders or enter into cooperative agreements as envisioned by 42 USC §9604(c)(9). By being forced to site facilities, as contemplated by Congress, a state then has capacity for some types of wastes which it can then use to "bargain" with other states which have other types of facilities (e.g., landfills, incinerators, recycling plants) so as to assure the execution of interstate agreements.

(Footnote continued.)
EPA's "rubberstamp" approvals of clearly deficient CAPs submitted by many states is frustrating Congress' intent that all states ensure adequate capacity for proper hazardous waste management, and is imposing an unfair and unequitable burden on states such as New York that have sought to minimize the amount of their hazardous waste and provide adequate disposal capacity.

CONCLUSION

For the foregoing reasons, the State of New York respectfully urges this Court to affirm the determination of the Supreme Court of Alabama.

Dated: Albany, New York
April 7, 1992

Respectfully submitted,

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